

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WENDY ALONSO)	
Claimant)	
VS.)	
)	Docket No. 1,061,606
EXAMINETICS, INC.)	
Respondent)	
AND)	
)	
ZURICH AMERICAN INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the January 28, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) William G. Belden. Brenden W. Webb of Overland Park, Kansas, appeared for claimant. Julie A.N. Sample of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 23, 2013, preliminary hearing and exhibits thereto; the transcript of the November 16, 2012, deposition of Rosie Dominguez; the transcript of the November 16, 2012, deposition of Wesley J. Kubik; and all pleadings contained in the administrative file.

ISSUES

At the preliminary hearing, claimant sought payment of past medical bills, authorization of ongoing medical treatment by Dr. Jeffrey Bruce Kleiner, and temporary total disability compensation commencing May 21, 2012. On May 20, 2012, while working for respondent, claimant picked up her suitcase at the airport in Reno, Nevada, and felt something snap, crunch or pop in her back. The next day claimant had emergency back surgery in Reno. In her Application for Hearing, claimant asserts that she sustained a cumulative trauma injury to her low back, left leg and body as a whole for each and every day worked up to May 21, 2012.

ALJ Belden determined claimant proved that she sustained an injury by repetitive trauma arising out of and in the course of her employment with respondent. However, ALJ Belden concluded that claimant entered into her contract of employment in California, was injured outside of Kansas, and Kansas was not claimant's principal place of employment and, therefore, Kansas does not have jurisdiction. ALJ Belden found claimant gave notice of the injury by repetitive trauma on July 16, 2012, which was not timely under K.S.A. 2011 Supp. 44-520.

Claimant asserts that Kansas has jurisdiction, as respondent's only office is in Overland Park, Kansas, and Kansas is claimant's principal place of employment. Claimant urges the Board not to focus on where claimant lived or in which states she worked but, rather, the location of her base of operations, the location whence her paycheck was issued and if respondent had an office in Kansas. In her brief, claimant indicates that she does not allege she entered into her contract of employment or was injured in Kansas.

Respondent asks the Board to affirm ALJ Belden's Order. Respondent asserts: (1) Kansas has no jurisdiction as claimant was injured outside of Kansas, (2) claimant's principal place of employment was not in Kansas and she entered into her contract for employment with respondent while residing in California and (3) claimant failed to give timely notice of her injury by repetitive trauma. In its brief to the Board, respondent did not address the issue of whether claimant sustained an injury by repetitive trauma arising out of and in the course of her employment. Therefore, the Board will not address that as an issue.

1. Does Kansas have jurisdiction over this claim?
2. If so, did claimant give timely notice of her injury by repetitive trauma?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

The Board adopts the ALJ's rendition of the facts in the January 28, 2013, Order as its own as if specifically set forth herein except as hereinafter noted. ALJ Belden determined claimant sustained her personal injury on May 21, 2012. From claimant's testimony and medical records, it is apparent claimant's date of injury is May 20, 2012.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

right depends.¹ “Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”²

K.S.A. 44-505(a) states, in part: “Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state”

K.S.A. 44-506 states:

The workmen's compensation act shall not be construed to apply to business or employment which, according to law, is so engaged in interstate commerce as to be not subject to the legislative power of the state, nor to persons injured while they are so engaged: *Provided*, That the workmen's compensation act shall apply also to injuries sustained outside the state where: (1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless such contract otherwise specifically provides: *Provided, however*, That the workmen's compensation act shall apply to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of the state of Kansas and to all projects, buildings, constructions, improvements and property belonging to the United States of America within said exterior boundaries as authorized by 40 U.S.C. 290, enacted June 25, 1936.

Claimant acknowledged that she “does not allege that she entered into her contract of employment, nor does she argue she suffered her accidental injury in Kansas.”³ Claimant asserts the Board should focus on the location of her base of operations. Claimant cites *Speer*,⁴ wherein Speer operated a truck for respondent in multiple states. Speer lived in Kansas, but was home only 30 days a year. Speer’s paycheck and transportation were coordinated out of Montana or Texas, where respondent’s dispatch centers were located. Speer sustained an injury in 2001 working for respondent in San Francisco. Speer filed a second claim alleging that in 2002, he sustained three separate injuries in Arizona, Texas and Colorado. The Kansas Court of Appeals found Kansas did not have jurisdiction.

¹ K.S.A. 2011 Supp. 44-501b(c).

² K.S.A. 2011 Supp. 44-508(h).

³ Claimant’s Brief (filed Feb. 28, 2013). Note: page number not cited as claimant failed to paginate her brief.

⁴ *Speer v. Sammons Trucking*, 35 Kan. App. 2d 132, 128 P.3d 984 (2006).

Claimant asserts the most important fact in the Kansas Court of Appeals' analysis in *Speer* was that Speer's base of operations was not in Kansas. A reading of *Speer* does not support claimant's argument. Speer argued that his contract of employment was made within Kansas. That is different from the present claim, where claimant acknowledges she did not enter into her contract of employment in Kansas. In *Speer*, the Kansas Court of Appeals stated:

The relevant inquiry under K.S.A. 44-506(2) is whether Speer's employment contract was made within Kansas. "[A] contract is 'made' when and where the last act necessary for its formation is done. [Citation omitted.] When that act is the acceptance of an offer during a telephone conversation, the contract is 'made' where the acceptor speaks his or her acceptance. [Citations omitted.]" *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 261, 3 P.3d 551 (2000).⁵

The Kansas Court of Appeals determined that Speer traveled to Montana, where his offer of employment was accepted by Speer's employer. Consequently, in *Speer*, the deciding factor in determining that Kansas had no jurisdiction was that the last act to form Speer's contract of employment was made in Montana.

In *Lang*,⁶ the Kansas Court of Appeals indicated the facts were analogous to *Speer*. Lang asserted he accepted respondent's offer of employment while in Kansas. However, respondent required Lang, in order to become employed, to complete orientation and paperwork and pass a drug test in Missouri. The Kansas Court of Appeals found the foregoing activities were the last act necessary to complete Lang's employment contract and took place in Missouri. Accordingly, the Kansas Court of Appeals affirmed the Board's Order finding that Kansas did not have jurisdiction.

The fact that claimant received her travel instructions and paycheck from respondent's only office in Kansas is not the decisive factor in determining jurisdiction. As stated by the Kansas Court of Appeals in *Speer*, the relevant factor in determining whether Kansas has jurisdiction is: Where was claimant when she entered into her employment contract with respondent? Claimant concedes she was in California when she entered into her contract of employment with respondent. Claimant never worked in Kansas after becoming respondent's employee. Therefore, this Board Member finds that Kansas has no jurisdiction over this matter.

The issue of whether claimant gave timely notice of her injury by repetitive trauma is moot.

⁵ *Id.* at 140-141.

⁶ *Lang v. Leggett & Platt, Inc.*, No. 104,243, 2011 WL 1377089 (Kansas Court of Appeals unpublished opinion filed Apr. 8, 2011, rev. denied Jan. 20, 2012).

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁸

WHEREFORE, the undersigned Board Member affirms the January 28, 2013, preliminary hearing Order entered by ALJ Belden.

IT IS SO ORDERED.

Dated this ____ day of April, 2013.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Brenden W. Webb, Attorney for Claimant
bwebb@hdwlawfirm.com

Julie A.N. Sample, Attorney for Respondent and its Insurance Carrier
julie.sample@zurichna.com

William G. Belden, Administrative Law Judge

⁷ K.S.A. 2012 Supp. 44-534a.

⁸ K.S.A. 2012 Supp. 44-555c(k).